No. 93-1613

In the Supreme Court of the United States

OCTOBER TERM, 1993

EUGENE LUDWIG, COMPTROLLER OF THE CURRENCY, ET AL., PETITIONERS

v.

VARIABLE ANNUITY LIFE INSURANCE COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. Respondent Variable Annuity Life Insurance Company argues (Br. in Opp. 11)—for the first time—that annuities should be treated as "insurance" for purposes of 12 U.S.C. 92 because a proviso to an exception to a provision of the Bank Holding Company Act specifies "annuities," as well as life insurance, as products that small bank holding companies may sell only under certain circumstances. See 12 U.S.C. 1843(c)(8)(F), reprinted at Br. in Opp. App. 5a. That argument is unpersuasive. Section 1843(c)(8)(F) excepts the sale of annuities from an otherwise general grant of authority to small bank holding companies to engage in "any insurance agency activity." Because annuities have traditionally been underwritten by

insurance companies, Congress might well have considered their sale an "insurance agency activity" for purposes of the Bank Holding Company Act without deeming annuities to be "insurance" for all other statutory purposes. Respondent's argument seeks to equate the meaning of the word "insurance" as used in 12 U.S.C 92, a banking statute passed in 1916, with the meaning of terms used in a proviso added to a bank holding company statute in 1983. Act of Jan. 12, 1983, Pub. L. No. 97-457, § 30(1), 96 Stat. 2511. That is not a correct approach to statutory interpretation. See *Independent Ins. Agents* v. *Ludwig*, 997 F.2d 958, 962 (D.C. Cir. 1993); see also, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 26 (1983).

2. The Comptroller's decision in this case reasoned (93-1612 Pet. App. 42a-43a) that even if annuities could be considered "insurance," 12 U.S.C. 92 applies only to "types of insurance that are similar to fire and life insurance, such as other general casualty insurance." Respondent disputes that reasoning (Br. in Opp. 9) on the ground that the words "fire, life, or other" in Section 92 describe the type of company for which a covered bank may act as agent, not the types of insurance it may sell. Section 92 provides, however, that small-town banks may "act as the agent for any fire, life, or other insurance company * * * by soliciting and selling insurance and collecting premiums on policies issued by such company." The Comptroller could fairly read that language to limit both the types of companies and the types of "insurance" to which Congress intended the statute to apply. In any event, respondent does not seriously contest the petition's point (Pet. 14-17 & n.6) that both the text of Section 92 and its historical

background indicate that in enacting that provision Congress sought to permit banks in small towns to sell a broad range of general insurance products, not to *prohibit* banks generally from selling forms of "insurance" whose sale the Comptroller determines to be incidental to the business of banking.

3. Respondent suggests (Br. in Opp. 12) that the Comptroller's decision to permit banks to sell annuities "reversed the Comptroller's previous interpretation of section 92 in 1978 and 1982," and therefore "is not entitled to significant deference." Even if respondent's factual premise were true, its conclusion would be incorrect. *E.g.*, *Good Samaritan Hosp.* v. *Shalala*, 113 S. Ct. 2151, 2160-2161 (1993). In fact, however, respondent points to no prior inconsistent administrative precedent.

The 1978 letter reprinted in the Brief in Opposition (at 1a-2a) represents informal advice rendered by an agency lawyer who had no authority to issue binding opinions on behalf of the Comptroller or the agency's Chief Counsel. The letter does not represent a formal interpretation by the Chief Counsel, contains no analysis supporting the views expressed, and clearly identifies its conclusions as the personal opinion of the author. *Ibid.*; compare, *e.g.*, Office of the Comptroller of the Currency (OCC), Interpretive Letter No. 499, [1989-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,090 (1990) (Chief Counsel's opinion underlying Comptroller's decision at issue in this case). Such a letter is not an action that would bind the agency or the recipient, be subject to review by the courts, or raise any issue of deference. See *New York Stock Exchange* v. *Bloom*, 562 F.2d 736, 741 (D.C. Cir. 1977) (informal Comptroller opinion letter

not ripe for review), cert. denied, 435 U.S. 942 (1978); *American Land Title Ass'n* v. *Clarke*, 743 F. Supp. 491, 494 (W.D. Tex. 1989) (letters from OCC Chief Counsel and staff not final agency action); *American Fed'n of Gov't Employees* v. *O'Connor*, 747 F.2d 748, 752-753 (D.C. Cir. 1984) (advisory opinion of counsel to Merit Systems Protection Board), cert. denied, 474 U.S. 909 (1985).

The 1982 letter that respondent cites (Br. in Opp. 4) sets forth a similar informal opinion by a member of the OCC legal staff. See OCC, Interpretive Letter No. 241, [1983-1984 Transfer Binder] Fed. Banking L. Rep. ¶ 85,405 (1982). That letter's analysis of sales of term life insurance, moreover, does not conflict with the Comptroller's position with respect to sales of fixed and variable annuities. The letter points out that the Fifth Circuit's decision in *Saxon* v. *Georgia Ass'n of Indep. Ins. Agents*, 399 F.2d 1010 (1968), relied on by the court below in this case (see 93-1612 Pet. App. 6a-10a), can be distinguished from the D.C. Circuit's decision in *Independent Bankers Ass'n* v. *Heimann*, 613 F.2d 1164 (1979), cert. denied, 449 U.S. 823 (1980), because *Heimann* involved a specialized insurance product ("credit life" insurance) closely related to the business of banking, rather than the general "automobile, home, casualty and liability insurance" at issue in *Saxon*. In the passage that respondent quotes in part (Br. in Opp. 4), the 1982 letter expresses the view that, unlike sales of credit life insurance, sales of ordinary term life insurance were probably not sufficiently related to the business of banking to come within a bank's general powers under 12 U.S.C. 24 Seventh. In the present case the Comptroller has determined that, even if annuities

are considered "insurance" for purposes of Section 92, sales of annuities are, like sales of credit life insurance (but unlike most sales of general casualty or liability insurance), incidental to the business of banking. 93-1612 Pet. App. 43a. The 1982 letter is therefore consistent with the Comptroller's decision in this case.

4. The court of appeals' opinion makes no distinction between fixed and variable annuities, but forbids national bank sales of annuities of any type. Compare Pet. 4-5, 6 & n.3, 17 n.9. Respondent, on the other hand, attempts (Br. in Opp. 11 n.5) to distinguish this Court's decision in *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65 (1959), which held that certain annuities were not "insurance" for purposes of exemption from the federal securities laws, on the ground that that case dealt only with variable annuities. Respondent's argument concedes the existence of considerable tension between this Court's decision in *SEC* v. *VALIC* and the decision below with regard to variable annuities, which constitute the bulk of annuities currently sold (through banks or otherwise).

5. Respondent contends (Br. in Opp. 15-16) that most bank annuity sales "will be totally unaffected by the outcome of this case." If that assertion were true, it is difficult to understand why respondent would have initiated and pursued this case. Moreover, while it is true that national banks generally market annuities through subsidiaries, respondent does not explain why that fact lessens in any respect the impact of the court of appeals' decision, which overturned the Comptroller's approval of precisely such an arrangement. See Pet. 4. National bank sub-

sidiaries may engage only in activities in which their parent banks could engage directly. See 12 C.F.R. 5.34(c). With respect to state-chartered banks, as amici the American Bankers Association *et al.* point out (Br. 19 & App.), those in three-quarters of the States will effectively be subject to the decision below, because statutes in those States tie the powers of state banks to those exercised by national banks. As the petition points out (at 24), the fact that, under the court of appeals' decision, banks chartered in other States (including New York) will be permitted to market annuities, while national banks and banks chartered in States that follow federal law will not, is a reason for granting, not denying, review in this case. Finally, respondent's contention that banks may be able to market annuities through more elaborate (and presumably less efficient) legal structures, see Br. in Opp. 16, only reenforces the point that the court of appeals erred in substituting its own interpretation of the relevant statutes for the reasoned judgment of the administrator whom Congress has entrusted with primary responsibility for interpretation and enforcement of the federal banking laws. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984).

For the foregoing reasons and those previously stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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